



**Obwana v Wakhisi & 2 others (Civil Application E102 of 2022)
[2023] KECA 48 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 48 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E102 OF 2022
F TUIYOTT, JA
FEBRUARY 3, 2023**

BETWEEN

FREDRICK ITELA OBWANA APPLICANT

AND

PETER WASWA WAKHISI 1ST RESPONDENT

SIMON KAYERI ADAMBA 2ND RESPONDENT

HEZBON OYALO 3RD RESPONDENT

*(Being an application for extension of time to file an appeal out
of time from the judgment of the High Court of Busia (Omollo, J)
delivered on 30th September 2020 in BUSIA ELC NO. 70 OF 2016)*

RULING

1. Before me is a notice of motion dated July 26, 2022 brought under the provisions of rule 4 of the rules of this Court and other statutory provisions which are inapplicable wherein the applicant seeks two substantive orders from this court. The first is leave of this court to file an appeal out of time against the decision of A. Omollo, J delivered on September 30, 2020 in Busia Environment Land Court (ELC) No 70 of 2016. Second, he seeks a stay of execution of the said judgment pending the hearing and determination of the intended appeal. As this is a single judge application, I am unable to consider the application for stay (see *Kenya Industrial Estates Ltd v Samuel Sang & another* [2008] eKLR).
2. Regarding leave to appeal out time, this court is told that the judgment of the ELC was delivered on September 30, 2020 and a notice of appeal was filed on October 13, 2020 and served upon the respondents. That a letter requesting for certified copies of the proceedings was also filed on the same day. The applicant deposes that the delay in filing the substantive appeal was due to the delay by the ELC in availing certified copy of the proceedings. Eventually, a certificate of delay was issued on July 19, 2022 and the applicant moved to file the present application.



3. The respondent filed a reply to the application through the replying affidavit sworn by their advocate Joseph Vitalis Juma on September 12, 2022. He contends that the letter bespeaking copies of the proceedings and judgment was copied to and served on his firm on October 13, 2020 while the notice of appeal was served on January 20, 2021. He then proceeds to respond to the issues of stay which I shall not address in this decision.
4. Both parties have filed their submissions which are a regurgitation of their affidavits save for the respondents' additional submission which draws this court's attention to the dates on the certificate of delay, which in their opinion, do not tally with reality.
5. The discretion granted to this court by rule 4 of the *Court of Appeal Rules* when considering an application for extension of time must be exercised judiciously. The party seeking extension of time must have a good explanation for the delay, demonstrate that the delay is not inordinate and that the respondent will not suffer prejudice if extension is granted and, possibly, that the intended appeal has good prospects of success. See *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR).
6. The institution of an appeal is provided for under rule 82 of the 2010 rules (now rule 84):- 82. Institution of appeals
 1. Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
 - a. a memorandum of appeal, in quadruplicate;
 - b. the record of appeal, in quadruplicate;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.
 2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.
 3. The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.

outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
7. The judgment was delivered on September 30, 2020 and a notice of appeal duly lodged in the ELC on October 13, 2020. The appeal would have then been required to be filed sixty (60) days of the latter date. However, as the applicant bespoke proceedings on October 13, 2020, then pursuant to the proviso to subrule 1, he would benefit from the freeze placed on the time needed for preparation and delivery of proceedings in computing the time within which the appeal ought to be instituted.
8. Yet the certificate of delay relied on by the applicant is not without a defect.

While it was issued on July 11, 2022, it purports to certify a delay ending on October 18, 2022, a date after it was issued. What, however, the body of the certificate speaks to is that the proceedings and



judgment were ready for collection on July 18, 2022 and that being the relevant date for purposes of working out the period to be excluded in computing time within which the appeal ought to be instituted, then I am willing to overlook the apparent defect in the certificate. The result is that the appeal ought to have been instituted by September 19, 2022 and it is evident that this application, filed on July 26, 2022, was premature and unnecessary. That said, and because his counsel has misconstrued the rules, the applicant would at the date of delivery of this ruling be out of time. So as to meet the ends of substantial justice I would, while striking out the premature application dated July 26, 2022, grant the applicant fourteen (14) days to institute and serve the intended appeal. As to costs, the respondents have had to respond to an unnecessary application and deserve costs of the struck-out application. Costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF FEBRUARY, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

